IN THE

Supreme Court of the United States

No. ~~15 Misc.~~ 391 OCTOBER TERM—1952

HARRY A. STEIN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

REPLY BRIEF OF PETITIONER HARRY A. STEIN

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Because of the crucial nature of the question involved, and in view of this Court's "solicitude, *especially where life is at stake*, for those liberties which are guaranteed by the Due Process Clause of the Fourteenth Amendment" (*Hysler* v. *Florida*, 315 U. S. 411, 413), petitioner is constrained to file a Reply Brief, conformably with the provisions of Rule 38, Subd. 4(a) of the Rules of the Supreme Court of the United States. (Italics supplied.)

In its recital of "Record Facts Material to the Questions Presented" Respondent sets forth (Respdt's Brief, pp. 10-18) a condensation of the testimony of eight witnesses, none of which testimony was "material to the questions presented". We find significantly, no reference thereunder to the testimony of any of the witnesses called by petitioners Cooper and Stein upon the preliminary examinations as to the voluntariness of their respective confessions.

The extraordinary statements that petitioners "deliberately refused to assist the Judge and Jury in determining whether or not the typewritten confessions of Cooper and

Stein were coerced" (Respdt's Brief, p. 5), and that Wissner "chose to forego his precious right to take the stand and assert his innocence before the trial judge and the jury" (Respdt's Brief, p. 7) reflect a disposition to treat with indifference the fundamental requirement, rooted in tradition, announced by statute, and protected by Constitutional fiat, that an accused person shall not be compelled to testify, and his failure so to do does not create any inference or presumption that may be used against him (United States Constitution, Fifth Amendment; New York State Constitution, Art. 1, Sec. 6; Sec. 393 Code of Criminal Procedure of the State of New York; *People* v. *Courtney*, 94 N. Y. 490; *People* v. *Minkowitz*, 220 N. Y. 399; *People* v. *Manning*, 278 N. Y. 40; *Boyd* v. *U. S.*, 116 U. S. 616; *Bram* v. *U. S.*, 168 U. S. 543; *Mason* v. *U. S.*, 244 U. S. 362). Petitioners individually asserted their innocence by their pleas of "Not Guilty"; nothing more was required.

The views thus expressed by Respondent represent a doctrine, far reaching in its implications, which is not only at variance with established principle, but, coming from an official holding quasi-judicial office, portends a serious threat to other traditional rights.

Distilled to its essence, Respondent's main theme would appear to be that, the petitioners having failed to testify or furnish other *direct* proof of police violence, there is no issue of federal due process before this Court, "whatever circumstantial inferences might be drawn" from the "undisputed affirmative proof" of the "change in Stein's physical condition", as evidenced by the injuries shown (Respdt's Brief, pp. 26-27).

Concededly, there was no testimony of any eye-witness to the beatings which it is contended were inflicted by the State Police. Other than testimony by the victims themselves, there rarely if ever is, and as to such testimony, even in those cases where confessions have been ruled invalid it is apparently more often disregarded or discounted

by this Court than accepted (*Ashcraft* v. *Tennessee*, 322 U. S. 143; *Malinski* v. *New York*, 324 U. S. 401; *Watts* v. *Indiana*, 338 U. S. 49; *Turner* v. *Pennsylvania*, 338 U. S. 62; *Harris* v. *South Carolina*, 338 U. S. 68).

The confession chamber, by its nature, is hardly a place where outsiders are suffered to enter freely in order to witness the inquisitorial methods employed by police officers in extracting a confession. The Hawthorne Barracks furnish no exception to the rule, as witness the difficulty experienced even by counsel in gaining admittance (1342, 1349, 1379*).

As for the failure of the petitioners to testify, it has never been our understanding that this Court has set up *two* standards of due process in testing the validity of a confession: one for those who testify upon the preliminary examination as to its voluntariness, and one for those who do not. That testimony by a defendant has never been deemed a necessary requisite of proof of the involuntary nature of a confession finds compelling support in the fact, as pointed out in this petitioner's Brief (pp. 28-29), that this Court has ruled confessions invalid in cases where it has disregarded claims of police violence, *as testified to by the defendants* (*Watts* v. *Indiana*, *supra*; *Turner* v. *Pennsylvania*, *supra*; *Harris* v. *South Carolina*, *supra*), and, in one case where the Court did refer to such testimony (*Malinski* v. *New York*, *supra*, 403), the assertion was said to have "such a dubious claim to veracity that we lay it aside". See, also, *Johnson* v. *Pennsylvania*, 340 U. S. 881, where, on authority of *Turner* v. *Pennsylvania*, *supra*, this Court granted certiorari, though it disregarded the petitioner's testimony of beatings.

In *Lisenba* v. *California*, 314 U. S. 219, 238, Mr. Justice Black, in dissent, stated:

> "I believe the confession used to convict James was the result of coercion and compulsion, and that the

* Figures in parentheses refer, as in petitioner Stein's petition and brief, to pages of the printed record.

judgment should be reversed for that reason. The testimony of the officers to whom the confession was given is enough, *standing alone*, to convince me that it could not have been free and voluntary." (Italics supplied.)

There has been no intimation, in any of the so-called "confession cases" decided by this Court, that the failure of a defendant to testify would, perforce, prevent him from submitting proof of coercion by circumstantial evidence. In any case, the very fact that this Court has not heretofore passed upon the precise question here presented renders the petition in the case at bar one which this Court should review.

As pointed out in this petitioner's petition and brief, the grim total picture conveyed by the record, notwithstanding petitioner's failure to testify, leaves no room for doubt that the circumstances which brought them about were such as to render his confession and prior and subsequent oral statements inadmissible when weighed against the superior commands of due process. Far from relying "on statements, allegations and arguments of counsel" (Respdt's Brief, p. 5), petitioner Stein relies, in addition to the incidence of injury to all three prisoners and the whole unsavory "atmosphere of coercion", on the testimony of Trooper Crowley, Dr. Vosburgh, Warden Allen and John Duff, witnesses called by him upon the preliminary examination, none of whose testimony was considered by the trial Judge, even in submitting the matter of coercion to the jury as a question of fact.

Respondent argues (Respdt's Brief, p. 6) that, the issue of voluntariness having been submitted to the jury "under well-accepted legal principles", this Court will not interfere where "the state-approved instruction fairly raises the question of whether or not the challenged confession was voluntary" (*Lyons* v. *Oklahoma*, 322 U. S. 596, 601). Far from *fairly raising* "the question of whether or not the challenged confession was voluntary", the Court's charge,

incredible as it may seem, completely ignored the testimony of these four witnesses as applied to Stein. Their testimony, constituting the very cornerstone of the attack on the legality of Stein's confession, was effectively withdrawn from the jury's consideration.

As for Respondent's claimed finality of the judgment of the Court below (Respdt's Brief, p. 6), this Court has repeatedly, as in *Lyons* v. *Oklahoma, supra,* 603 (cited in this connection by Respondent), declared its readiness to intervene, under the mandate of due process, "regardless of the contrary conclusions of the triers of facts, whether judge or jury". Also, *Lisenba* v. *California, supra,* 226; *Ashcraft* v. *Tennessee, supra,* 145; *Ward* v. *Texas,* 316 U. S. 547, 550; *Watts* v. *Indiana, supra,* 55.

In *Stroble* v. *California,* 343 U. S. 181, 203, Mr. Justice FRANKFURTER, in dissent, stated:

> "When a State court has denied an asserted constitutional right, the State court cannot foreclose this Court from considering the federal claim merely by labelling absence of coercion a 'fact'."

Respondent's Brief refers (p. 25) to the testimony of Captain Glasheen that he "saw no cuts, wounds or bruises on any portion of Stein's person at any time on June 6 or 7", and to the fact that other Troopers "testified that no force or threats were used against Cooper" (Respdt's Brief, p. 19).

Judge LEHMAN, of the New York Court of Appeals, in *People* v. *Mummiani,* 258 N. Y. 394, 401, referring to denials of police violence, said:

> "We are confronted with the proposition of whether the courts must accept helplessly the bare denial of police officers of the accusation of brutality extorting a confession of crime of which the accused may or may not be guilty, without even requiring a full explanation of their conduct * * * though their conduct itself creates grave doubts which mere denial of violence does not allay."

In *People* v. *Valletutti*, 297 N. Y. 226, 230, the New York Court of Appeals held that the mere denial by the police that the defendant was beaten was not a sufficient accounting for marks and bruises appearing on the person of the defendant.

It is not without significance that Respondent's Brief makes no mention whatever of the important role played by Sergeant Johnson, one of the chief interrogators, who was with Stein at various times during the period of his illegal detention, and one of the Troopers in whose custody Stein had been immediately prior to the making of his first oral statement (1908). The District Attorney failed to call Johnson as a witness.

It is begging the question for Respondent to mention (Respdt's Brief, p. 25) that Mrs. Klaus, the stenographer who took Stein's written confession, testified that "no force or violence was used and no promises made during the time she was with defendant taking his confession, * * *. (1581-1582)." It has never been contended that the beatings occurred in her presence, while the statement was being taken down. As this Court is well aware, the coercive measures employed to render a suspect impotent of resistence invariably *precede* the taking of the formal written confession.

The various suppositions now advanced by Respondent in attempted explanation for the injuries sustained by the three petitioners represent a decided retreat from the self-infliction theory advanced upon the trial (1246, 1249, 1253, 1258, 1281, 1739-1740, 1810, 2707-2708, 2713), even though, as to Stein, the sole reference to the latter is to be found in the District Attorney's summation (2707-2708). With but a single, passing reference to the possibility of self-infliction (Respdt's Brief, p. 30), in marked contrast to the position taken in the Court of Appeals*, Respondent now stresses, instead, in the case of Stein, the "grip of a strong man" theory, as "a reasonable deduction for the

jury to make * * *" (Respdt's Brief, p. 29). Aside from the fact that there was no such testimony, it may not be amiss to point out that Stein was handcuffed the moment he left his brother's apartment, in the custody of the police (1960), and Sergeant Barber testified that he believed Stein was handcuffed when he arrived at the Hawthorne Barracks (2082), and hence there was no occasion for the application of the "grip of a strong man".

While this hypothesis may represent Respondent's current thought, as furnishing a somewhat less implausible avenue of escape from the dilemma presented by the necessity to account for petitioner's injuries, it suffers from the disadvantage of having no basis in the record, and no claim to reality. Certain it is that the bruises to Stein's left arm (1840), as noted by the witness Duff ("area of discoloration and bruises approximately 7 inches long and 4 inches wide") were produced by some agency more compelling than the "grip of a strong man", as were the injuries to other parts of petitioner's body.

In any case, it is clear that, as to Stein, every apologia which the Respondent has advanced, at one time or another, is not only intrinsically false but founded on sheer conjecture, and the duty of the prosecution to explain (*People* v. *Valletutti, supra*) has not been met.

As for the claimed failure of Stein to complain, nowhere does Respondent even undertake to discuss the fact that this petitioner did, as stated in his petition herein (p. 15), make detailed complaint in the form of a proceeding brought by him to suppress the confession, under Article

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* The following quotation is from the District Attorney's Brief (pp. 116-117) in the Court of Appeals: "Without being able to cross-examine the defendants, how could the People have better answered the inference of violence than they have done here? Must every jail have extra guards held ready to sit in front of the individual cells of confessing prisoners, from the time they are brought in until they are medically examined, to prevent a desperate man from using his shoe or other object on himself in a dark cell-block in an effort to wipe out a confession? Such effort would be fully worth while for a prisoner who knows he might thus save his own life."

charged with any crime (R. 1364); he was held for two and a half days (R. 1371, 1374-5), without sanction of any court or judge (R. 1371), in the course of which detention he was shown, handcuffed, to his son Calman (R. 1372).

The petitioner Cooper was, for 86 hours, held incommunicado, clothed and handcuffed (R. 1353, 1390-2, 1639), in one room 15 by 20 feet (R. 1394), until his arraignment on the night of June 8th.

On June 5th and June 6th he was interrogated by State Troopers working in relays, according to their testimony (R. 1312, 1317, 1361, 1403-4, 2072, 2087, 2103), for a total of twenty hours. At 10:45 P. M. on June 6th he commenced to confess (R. 1459), and signed a typewriteen question and answer statement at 2 A. M. on June 7th (R. 1460-1).

Exigencies of space preclude a more extended account, in this brief, of the measures which were visited not only upon Cooper, but upon members of his immediate family who were innocent even of suspicion. A full appraisal of the actions of the State Troopers in their treatment of Cooper, a gross sample of the technique used so insidiously throughout, and its over-all significance as pointing up the methods employed in the arrest, detention and inquisition of the other petitioners, is to be found in the separate Brief submitted on Cooper's behalf.

Stein's Arrest.

At 2 A. M. on June 6th petitioner was arrested, without warrant, at the home of his brother Lou Stein, with whom he was residing in New York City, by Detectives Mulligan, Whelan and O'Connor of the New York City Police, accompanied by several Troopers of the New York State Police, all of them attired in civilian clothes (R. 1958-60).

Before being taken from the home of his brother, petitioner requested that John Duff, an attorney with an of-

fice in New York City, be notified (R. 1687, 1960). Detective Mulligan, the senior officer and spokesman for the arresting group, testified that he knew of Mr. Duff, and knew that he was an attorney, though he did not know him personally[3] (R. 1962).

Trooper Crowley, one of the officers accompanying Mulligan, testified that petitioner "wanted to get hold of" Duff (R. 1687). He noticed nothing abnormal about petitioner's arms while petitioner, in his underwear, was washing up (R. 1986-7).

Outside the apartment petitioner was handcuffed, placed in an automobile, driven to a point in New York City where he was transferred to another car without State Police insignia (R. 1699), belonging to one of the State Troopers, and driven to the Barracks of the State Police, at Hawthorne, where he arrived at approximately 3 A. M. that day (R. 1689).

Detective Mulligan, although he admitted "the law says we must book him" (R. 1963), did not book petitioner at any station house in New York City, but, instead, turned him over to the State Troopers (R. 1688, 1963).

Stein's Detention and Interrogation:

The Barracks of Troop K of the New York State Police, at Hawthorne, are located in a secluded, rural section of Westchester County. The buildings are completely isolated, with no surrounding buildings, and no possibility of outcry being heard, or occurrences therein being witnessed by any outsider (R. 1340). The nearest building, a school house, is distant "1000 feet or more" from the Barracks (R. 1340).

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[3] The first person petitioner asked to be notified, the day after his release from the custody of the State Police, was this same attorney, John Duff (R. 1836, 1846).

For 68 hours petitioner was illegally detained, almost continuously in handcuffs, and, except for repeated questioning, held incommunicado in these Barracks, "under the exclusive control of the police, subject to their mercy and beyond the reach of counsel or of friends" (Mr. Justice Douglas, in *U. S.* v. *Carignan*, 342 U. S. 36, 39), before being arraigned before a Magistrate at ten o'clock at night on June 8th [4], during which period of illegal detention a written confession, as well as certain prior and subsequent oral statements, was obtained.

Isolated as are the Barracks, the section thereof in which petitioner was lodged, and the places where questioned (the locker room, in the basement of the Main Building (R. 1691-2, 1905), the Day Room, on the ground floor of the Main Building (R. 1909-10), and the Bureau of Identification Office, 200 feet from the Main Building, across a court yard (R. 1910)), are equally free of supervision from outside sources. There are no detention cells (R. 1639); no sleeping quarters are provided for prisoners or suspects (R. 1369, 1929), and a prisoner must rely upon the generosity of the police for his food (R. 1907, 2010).

Captain Glasheen, in command of the Barracks, testified that he, alone, determines when, if at all, a prisoner eats, sleeps or attends to his personal wants, and he has the arbitrary power to enforce his wishes in those respects, with no supervision from any source whatever (R. 2010-2013).

Glasheen did not know the precise time when petitioner was taken to the locker room, but conceded that it could have been "after his fingerprints were taken early in the

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[4] It is worthy of note that petitioners were arraigned on the evening of the day on which, at 3 P.M., a writ of habeas corpus, obtained by Duff on behalf of Stein in the county where the latter was arrested (New York), was returnable (R. 2966-2969, Stein's Exhibits EE, FF and GG for identification).

morning of June 6" (R. 1922). He there questioned petitioner from 10 A. M. to 11 A. M. on June 6th, with an armed guard present (R. 1906), at which time petitioner denied any connection with the Reader's Digest crime (R. 1906).

Shortly after 1 P. M., on June 6th, the questioning was resumed by Glasheen, in the locker room, at which time Sergeant Johnson was present, as were other officers and armed guards (R. 1907, 1925). This particular session lasted until 4 or 4:30 P. M., with petitioner still protesting his innocence (R. 1925).

That same day, "around 6:30 that evening" (R. 1926), the questioning was again resumed, in the locker room, this time for a more protracted period, lasting until 2:15 or 2:30 in the morning of June 7th, during all of which time petitioner, then 52 years of age, was kept awake and in handcuffs (R. 1926). The questioning, so intensified, was again conducted by Glasheen, "with other troopers and officers". On this occasion, between 2:15 and 2:30 A. M., Glasheen "read two questions and answers" from Cooper's confession to petitioner (R. 1939, 1954), who still proclaimed his innocence.

Considering the source, the estimate as to the number of hours spent in interrogation of petitioner is certainly not exaggerated. Throughout this entire period of intensive questioning, badgered and beleaguered at the will of his duressors, without the aid of counsel whose assistance he had sought from the moment of his arrest, and without the solace of relatives or friends, petitioner maintained his innocence.

Finally, at about 10 A. M. on June 7th, the contest of attrition came to an end. In response to a message from Trooper Johnson, who had been with petitioner, Glasheen returned to the locker room; at that time, supposedly, peti-

tioner, in the presence of Glasheen and Johnson, made an oral statement implicating himself. Its details were not put in evidence (R. 1908-9).

How long Johnson had been with petitioner does not appear in the record. Neither upon the preliminary examination as to the voluntariness of the confession, or at any time, was Johnson called as a witness by the prosecution; nor was any other Trooper, to account for the 16 of the first 32 hours of petitioner's illegal detention which remained unaccounted for even after Glasheen's testimony.

Although the first oral statement by petitioner was supposedly made some time between 10 and 11 A. M. on June 7th, the written confession, made in the "B. of I." office (R. 1911), was not signed until 4:30 that afternoon (R. 1914). The police stenographer, a former employee of the Reader's Digest Association (R. 1659), testified that the questioning was conducted by Glasheen, with Sergeants Johnson and Sayers present, as was Detective Whelan of the New York City Police during part of the questioning. She testified that there were discussions between the group which she did not take down (R. 1614-21), and that after the questioning was completed she saw petitioner sitting with his eyes closed (R. 1653). Glasheen testified that after the confession was signed, petitioner was given a tray of food (R. 1915).

There were subsequent oral statements testified to by the police. Detective Mulligan testified that at 11 P. M. on June 7th, in a conversation with petitioner, had in the presence of Sergeant Sayers "and other troopers", petitioner referred to Cooper's "putting him into the seat" (R. 2238-9).

Glasheen testified that on June 8th, "shortly before noon", petitioner described to him the clothing he wore on the occasion of the robbery, and, at Glasheen's sugges-

tion, gave Sergeant Manopoli a note to petitioner's brother, directing the latter to turn the clothing over to the bearer of the note (R. 1989, 1991). Neither the note nor any of the articles of clothing were offered in evidence.

Trooper Crowley testified that, on the afternoon of June 8th, petitioner accompanied the witness and Glasheen to the premises of the Reader's Digest, where petitioner supposedly pointed out to them various locations (R. 1704-5).

On June 8th, at about 6:15 P. M., in the presence of the District Attorney, Glasheen, Johnson and "armed guards", petitioner supposedly "identified" the witness Waterbury as the "driver of the truck" (R. 2461, 2917, Respondent's Exhibit 75).

After the arraignment on June 8th, *while still in the custody of the State Police* (R. 2017), petitioner supposedly made a further statement to Glasheen, in the presence of other Troopers, which statement was in the nature of a clarification as to the use of the truck employed in the robbery (R. 1996).

Counsel's Search for Stein.

It is undisputed that, at the time of his arrest, petitioner requested that John Duff, the attorney, be notified (R. 1687, 1960). Petitioner's brother complied by phoning the attorney at the latter's home at 7:20 A. M. June 6th (R. 1828).

Duff testified to the efforts he made to locate petitioner, efforts which were unavailing because of the fact that petitioner was taken into custody by Detectives Mulligan, Whelan and O'Connor *of the New York City police*, accompanied by other officers dressed in civilian clothes, whose identities were then unknown, and that he (the witness) "had every reason to believe that he [petitioner] was in the custody of the New York City police, because he had

been arrested by a New York City detective, Mulligan" (R. 1850).

Though there was some question, occasioned by the affirmative assertion of Detective Mulligan, whether, despite the veil of secrecy thrown about the movements of the police in this case, petitioner's brother was advised of petitioner's destination and the identity of the State Troopers (R. 1960), we submit that the undisputed proof in the record establishes, without substantial challenge, that he was not, as witness the fact that Dorfman and Wissner had not, at the time, been apprehended (R. 2019), and petitioner's brother, who was not detained, would have been free to disclose to those not yet apprehended information which had, up to that time, been a closely guarded secret (R. 155).

In addition to inquiring at various station houses in New York City, at Police Headquarters in New York City, at the Felony Court in the Borough of Manhattan of the City of New York and at the office of the Police Commissioner, Duff sought to communicate personally with Detective Mulligan, but without success (R. 1829).

Finally, on June 8th, Duff sued out a writ of habeas corpus, returnable at three o'clock that afternoon in New York County (R. 2968, petitioner's Exhibit FF for identification). At ten o'clock that night all three petitioners were arraigned before a Magistrate in Westchester County, after, in the case of Cooper, 86 hours of illegal detention; in the case of Stein, 68 hours of illegal detention, and, in the case of Wissner, the non-confessing defendant, 38 hours of illegal detention.

It was established that the judge before whom petitioners were arraigned had been available, during the period of petitioners' detention, "24 hours a day", "*at any time or any hour, around the clock*" (R. 1270).

Wissner's Arrest and Detention.

Following the revealed pattern in the cases of Cooper and Stein, Wissner was arrested on June 7th, at about 9 A. M., in New York City (R. 1320, 1325), and taken to the Hawthorne Barracks, without being booked at any station house in New York City. His wife was arrested with him and taken to the same State Police Barracks (R. 2300, 2311). That night she was obliged to sleep, fully clothed, on a bare mattress, on the floor of the Barracks (R. 1656-7). On June 8th, at about nine or ten o'clock at night (R. 1661), she was released, but only after the State Police had exacted from her, as a condition of her liberation, a release (R. 1376, 2960, Wissner's Exhibit S) absolving Sergeant Sayers, of the State Police, from any liability "by reason of any interference with my person or liberty". This was admittedly the "usual" practice of "members of the Troop, from the Inspector down" (R. 2251), and had the approval of Sayer's superiors (R. 2256).

Wissner was held incommunicado, and interrogated at length during the 38 hours of his illegal detention; he made no confession.

Dorfman's Surrender and Treatment.

Dorfman, the accomplice, accompanied by an attorney, surrendered to the District Attorney on June 19, 1950 (R. 659, 664), after having first taken the precaution of having his body examined and photographed by a physician (R. 656). While the attorney was in the act of conferring with the District Attorney, the State Troopers proceeded to spirit Dorfman away, from the District Attorney's office, to the confined privacy of the Hawthorne Barracks (R. 716-7). While there, and before being arraigned that evening, he was "*pushed around*" (R. 655), and was con-

tinuously questioned for nine hours (R. 657); his only food consisted of a dry bologna sandwich and coffee, just before being taken to court (R. 658).

The Injuries.

Shortly before midnight on June 8th the State Police lodged the three petitioners in the County Jail (R. 1273, 1858, 2517-8). Apart from the short period of time consumed in arraigning them before the Magistrate, they had been held incommunicado, separate and apart from each other, from the times of their respective arrests.

Early on the morning of June 9th the jail physician, Dr. Vosburgh, examined the three petitioners, each of whom was brought to the doctor's clinic *alone*, from distantly separated parts of the jail. No other prisoner was present when the doctor examined each one individually (R. 1860-1).

On Wissner, the first to be examined, he observed bruises on the left side of the chest. The fifth rib on the left side was broken, according to Dr. Vosburgh's record of June 9th (R. 3011, Exhibit PPP); the x-ray report of June 12th, however, showed that it was the sixth rib (R. 2957, Exhibit R), a revealing commentary on the trustworthiness of Dr. Vosburgh's records. There were abrasions of both shins, bruised areas on the thighs, the left side of the abdomen and the buttocks, and a bump on the head (R. 2954, Exhibit R. 3011-2, Exhibit PPP).

On Stein, next to be examined, the doctor's report showed multiple bruises "in the left upper arm, between the elbow and the shoulder" (R. 1713, 2909-10, Respondent's Exhibit 65). The witness Duff examined petitioner Stein the same day, at about 3 P. M. (R. 1838), and made a record, in shorthand, of his observations, which record was produced upon the trial (R. 1840, Stein's Exhibit HH for iden-

tification). He observed that "there were bruises on the left arm, his right arm and the left lower ribs below the breast" (R. 1839). Duff observed and made note of the dimensions of the bruises, as follows: "The left arm, area of discolorafion and bruises, approximately 7 inches long and 4 inches wide. Right arm, above the elbow, discoloration and bruises about 3 inches long and 1 inch wide. Left lower chest, second, third and fourth ribs, from the floating ribs to the left and below left breast, black and blue marks in area approximately 3 by 4 inches" (R. 1840).

On Cooper, the last of the three to be examined by Dr. Vosburgh on the morning of June 9th, the latter found "bruises on the left posterior lateral chest, abdomen, in the right bicep area, and on both buttocks" (R. 1237-9, 2971, Exhibit BBB).

Thomas J. Todarelli, a member of the New York Bar, testified to extensive injuries which he and two other attorneys observed and measured on the person of Cooper on June 10th (R. 1260-3). His description supplements that of the jail physician, just as Duff's observations and notations supplement the doctor's record of Stein's injuries.

A week later Duff again examined Stein, and observed that "The bruise marks on the left arm were faintly discernable (sic), those on the left arm were not as pronounced as on the first occasion when I observed them on June 9, but they were still clearly noticeable. The bruises in and about the ribs were still clearly noticeable" (R. 1841).

The prosecution did not question this witness concerning the injuries which he described, and, in fact, conceded that he would not commit perjury (R. 1845). On summation the District Attorney frankly stated that he did not

question the witness' observations, but sought to account for the injuries described by him on the theory of self-infliction (R. 2707-8).

The Complaints.

"We have now reached the final chapter of this unedifying story in the administration of criminal justice" (*Hysler* v. *Florida*, 315 U. S. 411, 415). On June 16th Stein personally entered a plea of Not Guilty to the original indictment [5], and requested that counsel be assigned to represent him (R. 1848-9). Though Duff was present on that occasion, he emphasized that he was there "to note" his "withdrawal" (R. 1848), although it is undisputed that, despite the witness' use of the term "withdrawal", he had never appeared in Court on behalf of petitioner, but had merely filed an "informal notice of appearance" (R. 1838), in which it was stated that he "expected" that he "would be retained as attorney" (R. 1846), which "informal notice of appearance" was required of him by the District Attorney before he was permitted to interview petitioner at the County Jail (R. 1838).

No assignment of counsel was made until July 24, 1950 (R. 14-15), after which assignment detailed complaint was made on August 29, 1950, in the form of a proceeding instituted in the Supreme Court of Westchester County, under Article 78 of the New York Civil Practice Act (R. 1842-3, 1856, Exhibit II for identification), to suppress his confession upon the ground that the same had been obtained during a period of illegal detention, after prolonged questioning, and by means of police violence and coercion, all in violation of his constitutional rights. Petitioner's sup-

[5] A superseding indictment was filed on June 30, 1950 (R. 8).

porting affidavit set forth in detail the acts complained of.[6] The proceeding was dismissed, upon the ground that "Whether the confession was voluntary or not can be tried at the trial by the jury. Their determination will indicate whether the grave charges made against the police are true, and that determination will indicate the course then to be pursued"[7].

No other method is provided in New York State whereby a defendant who claims that his confession was an involuntary one can himself give sworn proof of what took place in the confession chamber, without being compelled to testify, and thus subject himself to questioning on the principal crime charged in the indictment, before the very jury which is trying the ultimate question of his guilt or innocence.

The procedural risks which beset a defendant who would be heard on the question of the voluntariness of his confession are a deterring consideration. There is no provision for trying the issue out of the hearing of the jury, as is the case in the federal courts, as well as in many state jurisdictions. Under the procedure in New York State a defendant who would contest the validity of his confession is confronted with a dilemmatic choice which is at conflict with the spirit of the privilege against self-incrimination.

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[6] As contained in Exhibit II for identification, it recites that at the time of arrest Detective Mulligan and Trooper Crowley promised to notify petitioner's lawyer, Duff; that after arrival at the Hawthorne Barracks, and until he confessed, petitioner was repeatedly punched and kicked by different Troopers; that he was compelled to remain awake; that he was refused food; that he asked for his lawyer on numerous occasions, and each time was kicked and told that he could not see him, that he was police property, and that if he continued to "holler" for his lawyer the Troopers would kill him. He was told that his sweetheart was being detained, and that she would be released only when he had confessed.

[7] Order of Mr. Justice Schmidt, Justice of the New York Supreme Court, Westchester County, which appeared in the New York Law Journal of September 15, 1950.

It should be noted that there were, concededly, also six formal complaints made on behalf of Cooper and two on behalf of Wissner, by the attorneys, on the dates and in the manner noted:

June 10 Attorney Sabbatino, to Deputy Warden Allen (R. 1882),

June 10 Attorney Sabbatino, by telephone, to District Attorney Fanelli (R. 1228-9),

June 10 Attorneys Sabbatino, Todarelli and Reisner, by telegram, to District Attorney Fanelli (R. 1232, and Exhibit CCC for identification, R. 2973),

June 10 Attorney Todarelli, to County Court, Westchester County (R. 2974-83, Exhibit DDD for identification),

June 15 Attorney Todarelli, to County Court, Westchester County (R. 2982),

June 16 Attorney Goldstein, to County Court, Westchester County (R. 1873-4),

June 16 Attorney Goldstein, to Supreme Court Justice Flannery of Westchester County (R. 1873-4),

June 16 Attorney Todarelli to Supreme Court Justice Flannery of Westchester County (R. 2984-96, Exhibit FFF for identification).

These complaints of police violence, the announced purposes of which were to bring about further examination by an outside physician and to cause an inquiry to be made into the conduct of the State Police in this case, resulted in neither a re-examination of petitioners or an inquiry into the actions of the State Troopers.

Argument

Notwithstanding that the jury and the Appellate Court below have resolved against petitioner the question of voluntariness in connection with the manner in which his confession and prior and subsequent oral statements were

obtained, we respectfully submit that this Court is not bound thereby, but is under the duty of making an independent determination on the undisputed facts (*Haley* v. *Ohio*, 332 U.S. 596, 599; *Malinski* v. *New York*, 324 U.S. 401, 404, and cases cited; ibid, 438; *Stroble* v. *California*, 343 U.S. 181, 189).

Aside from the undisputed proof of serious physical injuries *to all three petitioners*, injuries which bespeak a course of violence only exceeded by the brutalities which were rife in the Elizabethan era, the agglomerate of facts points, in overwhelming measure, to an atmosphere which was "inherently coercive". The undisputed facts in the record constitute a searing indictment of the lawless conduct of the New York State Police and the criminally repressive methods regularly and systematically employed by them. The extortion of a release from Wissner's wife, as a condition of her liberation from a detention which was illegal from its inception, to take but one example, is perhaps best epitomized in the phrase "insolence of office". Adding extortion and chicanery to their other excesses, there were apparently no depths to which the New York State Police were unwilling to descend in this case. This is harsh judgment, it is true, but the record supports it. In these deeply trouble times, when the survival of our way of life is at stake, such cynical disregard of the rights and dignities of free men constitutes a potent threat from within. To equate the methods used with "voluntariness" is to reject the whole concept of due process expressed by this Court.

Respondent has urged upon this Court (Respondent's brief in opposition to petitions for writs of certiorari, pp. 4-7, 33-4, 41, 48) that the failure of petitioner to testify upon the preliminary examination or furnish other *direct* proof of police violence, coupled with the fact of denials by the police, is decisive on the issue of due process. We

feel that the question is one of such importance, not only to the decision of this cause but to the body of federal law, as to require the fullest treatment in this brief.

Concededly, there was no testimony of any eyewitness to the beatings which it is contended were and could only have been inflicted by the State Police. Other than testimony by the victims themselves, there rarely if ever is, and as to such testimony, even in those cases in which confessions have been ruled invalid it is apparently more often disregarded or discounted by this Court than accepted (*Ashcraft* v. *Tennessee*, 322 U. S. 143; *Malinski* v. *New York*, supra, 403; *Watts* v. *Indiana*, 338 U. S. 49; *Turner* v. *Pennsylvania*, 338 U. S. 62; *Harris* v. *South Carolina*, 338 U. S. 68).

The confession chamber, by its nature, is hardly a place where outsiders are suffered to enter freely in order to witness the inquisitorial methods employed by police officers in extracting a confession. The Hawthorne Barracks furnish no exception to the rule, as witness the difficulty experienced even by counsel in gaining admittance (R. 1342, 1349, 1379).

As for the failure of the petitioners to testify, it has never been our understanding that this Court has set up *two* standards of due process in testing the validity of a confession: one for those who testify upon the preliminary examination as to its voluntariness, and one for those who do not. That testimony by a defendant has never been deemed a necessary requisite of proof of the involuntary nature of a confession finds compelling support in the fact that this Court has ruled confessions invalid in cases where it has disregarded claims of police violence, *as testified to by the defendants* (*Watts* v. *Indiana*, supra; *Turner* v. *Pennsylvania*, supra; *Harris* v. *South Carolina*, supra), and, in one case where the Court did refer to such testimony (*Malinski* v. *New York*, supra, 403), the assertion was said

to have such a dubious claim to veracity that we lay it aside". See, also, *Johnson* v. *Pennsylvania*, 340 U. S. 881, where, on authority of *Turner* v. *Pennsylvania*, supra, this Court granted certiorari though it disregarded the petitioner's testimony of beatings.

There has been no intimation, in any of the so-called "confession cases" decided by this Court, that unless a defendant testifies it is futile for him to introduce proof of police violence of the character introduced in the case at bar.

The factor of violence, even in the absence of direct proof, is implicit throughout this case. The testimony of Trooper Crowley, Deputy Warden Allen, Dr. Vosburgh and John Duff, witnesses called by petitioner upon the preliminary examination, to say nothing of the damning circumstance of injuries *to all three petitioners*, points unmistakably to a studied course of police savagery unparalleled in the reported cases of this Court. In the face of the bruises appearing on the body of petitioner on the morning of June 9th, bruises which were not present at the time of his arrest on June 6th, how can it possibly be said that petitioner was not beaten during the period of his illegal detention in the Hawthorne Barracks?

Putting to one side the controverted evidence, and taking only the undisputed testimony, we have the following sequence of events. At 2 A. M. on June 6th petitioner was arrested at the home of his brother (R. 1958). Before being taken from the apartment, he washed up, while clad in his underwear (R. 1986). At that time Trooper Crowley observed nothing abnormal about petitioner's exposed arms (R. 1987). From the moment of his arrest he was continuously in the custody of the State Police until about midnight June 8th, when he was lodged by them in the County Jail (R. 1273). Early the next morning he was

examined by the jail physician, that afternoon by a lawyer for whom he had sent, both of whom were in agreeemnt as to the multiple bruises found in the area of the left arm of petitioner, between the elbow and the shoulder. The attorney's examination, a more thorough one, we submit, disclosed numerous other bruises on various parts of petitioner's body (R. 1840-1).

If this undisputed evidence, this panorama of events does not at least "suggest that force or coercion was used to exact the confession" (*Haley* v. *Ohio*, supra, 599), then we respectfully submit that the term has lost its meaning.

Any remaining doubt as to the measures visited upon petitioner by the State Police is dispelled, beyond possibility of refutation, by the undisputed fact of the injuries appearing on the bodies *of all three petitioners* almost immediately after their release from the custody of the State Police. This proof of physical injury, so tellingly portrayed even by the admittedly incomplete recorded entries of a county official who was definitely a hostile witness, leads to but one inevitable conclusion, namely, that the confession of petitioner was "coercion's product", as was the confession of Cooper, their failure to testify or furnish other direct proof notwithstanding.

The duty of the prosecution "satisfactorily to account" (*People* v. *Valletutti*, 297 N. Y. 226, 230) for these injuries was not conditional upon the petitioner's having first testified or offered other direct proof of police violence. In token acknowledgment of that rule, the prosecution has undertaken, at different times and in different ways, and with a somewhat bewildering variety of hypotheses, to explain the manner in which the injuries to these three petitioners were sustained.

In all the multiplicity of theories put forward, the one which was common to all three petitioners was the self-in-

fliction theory advanced upon the trial (R. 1246, 1249, 1253, 1258, 1281, 1737-40, 1810, 2707-8, 2713), even though, as to Stein, it was advanced for the first time in the course of the prosecutor's closing remarks to the jury: "I am not saying that Mr. Duff is not telling the truth; but Dr. Vosburgh said that those injuries could have been self-inflicted" (R. 2707-8). Actually, Dr. Vosburgh never so testified as to Stein. Though the explanation is, on the face of it, so patently unreal and fantastic, we nevertheless feel constrained to point to one undisputed fact which disposes, with devastating finality, of the prosecution's whole specious attempt to so account for the injuries received by the three petitioners. Wissner, *the non-confessing petitioner*, bore the most aggravated injuries. He had no confession to explain away, and yet the prosecution argued before the jury and the Appellate Court below that he inflicted these injuries upon himself, while Cooper and Stein, in distantly separated parts of the County Jail, were performing similar rites of self-flagellation. The utter absurdity of the theory is rendered self-evident by the nature of the injuries, injuries which appeared all over the petitioners' bodies, even on such portions of the body as the buttocks (R. 3012, 2971).

Equally bizarre was the other theory advanced as to Stein, founded upon the answer to a hypothetical question put to Dr. Vosburgh, not based upon any evidence in the case, that the injuries which petitioner sustained could have been inflicted by the "grasp" of a "strong, healthy officer with a strong grip" (R. 1740). Aside from the fact that there was no such testimony, it may not be amiss to point out that Stein was handcuffed the moment he left his brother's apartment, in the custody of the police (R. 1960), and Sergeant Barber testified that he believed Stein was handcuffed when he arrived at the Hawthorne Bar-

racks (R. 2082), and hence there was no occasion for the application of a "strong grip". The explanation suffers from the disadvantage of having no basis in the record and no claim to reality. Certain it is that the bruises to Stein's left arm (R. 1840), as noted by the witness Duff ("area of discoloration and bruises approximately 7 inches long and 4 inches wide") were produced by some agency more compelling than the grip of a strong man, as were the injuries to other parts of petitioner's body.

It is only fair to add, in connection with the injuries sustained by petitioner, that both Glasheen and Sergeant Barber testified that not a hand was laid on him (R. 1914, 1931-2, 1149, 2083), but it is also true that charges of police brutality, even where supported, as in the case of petitioners, by incontrovertible proof, inevitably evoke denials by the police, denials which have become a shopworn stereotype.

> "As is usual in this type of case the deputies say that the confession was wholly 'voluntary'; . . ." (Mr. Justice Black, dissenting, in *Gallegos* v. *Nebraska*, 342 U.S. 55, 74).

It would be the height of naiveté to expect these officers to admit under oath to the commission by them of a serious crime. Certainly the members of this Court are not, like so many cloistered academics, so removed from everyday reality as to expect petitioners to prove acts of police brutality *out of the mouths of the very perpetrators of such acts.* In the light of the undisputed proof of physical injury to all three petitioners, their denials are meaningless.

Judge Lehman, of the New York Court of Appeals, in *People* v. *Mummiani*, 258 N.Y. 394, 401, referring to denials of police violence, said:

> "We are confronted with the proposition of whether the courts must accept helplessly the bare denial of

police officers of the accusation of brutality extorting a confession of crime of which the accused may or may not be guilty, without even requiring a full explanation of their conduct . . . though their conduct itself creates grave doubts which mere denial of violence does not allay."

It is, of course, petitioner's contention, as it was upon the trial and upon appeal to the Court below, that the confession and prior and subsequent oral statements should have, in the first instance, been ruled invalid by the Trial Court *as a matter of law,* and the matter of their voluntariness not submitted to the jury as a question of fact (*People* v. *Barbato,* 254 N.Y. 170). Even as a question of fact, however, the matter was never submitted to the jury "under proper instructions" (*Gallegos* v. *Nebraska,* supra, 58). Not a single reference was made by the Court, in its charge, to the testimony of any of the four witnesses (Trooper Crowley, Deputy Warden Allen, Dr. Vosburgh and John Duff) called by petitioner upon the preliminary examination. Their testimony, constituting the very cornerstone of the attack on the legality of Stein's confession, was effectively withdrawn from the jury's consideration.

It may be said without overstatement that the conceded and proven facts in the instant case disclose a situation more flagrant and indefensible than was shown in any of the cases cited in this brief, for we have not only those determining factors which were present in *Ashcraft* v. *Tennessee,* supra, *Malinski* v. *New York,* supra, *Watts* v. *Indiana,* supra, *Turner* v. *Pennsylvania,* supra, and *Harris* v. *South Carolina,* supra, namely, the many hours of intensive interrogation, plus the illegal detention, but, *in addition,* that which was not present in any of the cases cited—*undisputed and indisputable proof of injuries sustained by all three petitioners.* This one factor, absent

from *Ashcraft* and its companions, demands their application on an *a fortiori* basis.

When the combined factors of illegally delayed arraignment, holding of petitioner incommunicado, intensive interrogation and physical injuries all appear in one case, *as in no other case decided by this Court*, the necessity for corrective action is, we respectfully urge, apparent.

As heretofore pointed out, in addition to the proceeding brought by Stein to suppress his confession under Article 78 of the New York Civil Practice Act, six separate complaints of police violence and of the inadequacy of the examinations made by Dr. Vosburgh were made on behalf of Cooper and Wissner. As might be expected of one who had given *carte blanche* to the State Police in this case, the District Attorney took a position on these various complaints which is appropriately expressed in the boast of Assistant District Attorney O'Brien, made upon the trial, that two of the complaints, in the form of applications to the Supreme Court of Westchester County, then under discussion, were not only opposed, but opposed "Vigorously, your Honor" (R. 1874). Making due allowance for zeal in advocacy, it is disillusioning to find this same assistant district attorney, who "vigorously" opposed the applications *in June*, unctuously asking the Court, *in December*, to rule that the defendants "are at liberty to call any physicians, if they so desire as to their physical condition" (R. 1798).

The Inexcusable Delay in Arraignment

It was conceded that the arraignment of all three petitioners was wilfully and wrongfully delayed in violation of the statutes (Sec. 165 Code of Criminal Procedure of New York State; Sec. 1844 Penal Law of the State of New

York). The Trial Court eventually so determined as a matter of law, as an afterthought at the end of its charge, although in the body of the charge the Court had first erroneously left it as a question of fact for the jury.

Although no time is stated, it is nevertheless implicit in such statutes that the arresting officer must act promptly and without unnecessary delay (*McNabb* v. *United States*, 318 U.S. 322).

There may be situations where delay is unavoidable, such as inability to locate a magistrate, or illness of the prisoner. As heretofore pointed out, a magistrate was available during every hour of the 68 hours of this petitioner's illegal detention (R. 1270)..

Were this a case arising in the federal courts there could be no doubt that the confession and prior and subsequent oral statements of petitioner could not stand against the rule of *McNabb* v. *United States*, supra, which forbids inexcusable detention for the purpose of extracting evidence from an accused, irrespective of actual coercion. Yet, since *McNabb*, in cases arising from state courts under the Fourteenth Amendment, *Ashcraft* v. *Tennessee*, supra, and *Malinski* v. *New York*, supra,[8] this Court has set aside convictions obtained by the use of confessions extracted after prolonged detention, coupled with intensive interrogation.

It is true that in *Malinski* there was the additional element of coercion in the form of threats of violence. Though the petitioner there claimed that there was, in fact, actual violence, this Court attached no weight to the claim.

In both cases there was proof of illegal detention, plus the usual concomitant of continuous questioning, and, in

[8] In *Ashcraft* the accused was detained by the police for 36 hours before being granted a preliminary hearing. In *Malinski* a confession obtained after ten hours detention was ruled invalid.

the case of *Malinski*, the added element of admitted threats, *but without proof of physical mistreatment.*

> "There was no visible sign of any beating such as bruises or scars" (*Malinski* v. *New York, supra*, 403).

Even apart from the elements of physical injury and continuous interrogation, both here present, there is certainly considerable support for the belief that the right to a prompt preliminary hearing is such an "impressively pervasive requirement of criminal procedure" (*McNabb* v. *United States*, supra, 343) that it must be considered among "the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land'" (*Herbert* v. *Louisiana*, 272 U. S. 312, 316).

Even if such a conclusion would seem to extend the implications of this Court's decisions and "the effect of a mere denial of a prompt examining trial is a matter of state, not of federal law" (*Lyons* v. *Oklahoma*, 322 U. S. 596, 597, n. 2), still it is clear that the fact of prolonged detention will be considered as affecting the voluntary nature of a confession (*Lyons* v. *Oklahoma*, supra; *Haley* v. *Ohio*, supra).

We are not unmindful that the mere fact that a confession was made while in the custody of the police does not render it inadmissible (*McNabb* v. *United States*, supra, 346). It is, however, a circumstance to be considered, as is the fact of an extended delay in arraignment, the holding of a prisoner incommunicado, without opportunity to see counsel or friends (*Ward* v. *Texas*, supra; *Malinski* v. *New York*, supra), and subjecting him to long and gruelling questioning (*Ward* v. *Texas*, 316 U. S. 547; *Watts* v. *Indiana*, supra). All of these elements are here present, *with the additional undisputed one of physical injuries.*

Although the District Attorney cannot be unaware that it is the law of this case that the arraignment of all three

petitioners was unnecessarily delayed, in violation of the positive mandate of the statutes, he nevertheless has attempted, throughout, to justify the delay because of "the problem confronting the State Police . . ." (Respondent's brief in opposition to petitions for writs of certiorari, p. 34). His strained effort at extenuation amounts to a contention that, having delayed the arraignment of Cooper and Stein in order to extract from them confessions, their arraignment could be still further delayed so as to facilitate the arrest of others named in the confessions, and again delayed during the interrogation of one of the persons so named, after his arrest.

On June 8th, before his arraignment late that night, the only "problem confronting the State Police" was the fact that Wissner had not confessed. Time was running out, and so, unable to operate at their leisure, and with a mastery of the art of persuasion which was something less than perfect, these crude practitioners inflicted upon Wissner injuries more serious than those sustained by either of the other two petitioners.

It reflects no credit on the District Attorney of Westchester County that, as he testified, he became aware on the afternoon of June 6th that Cooper had been in custody in the Hawthorne Barracks since the morning of June 5th (R. 1225). Notwithstanding this knowledge, he not only made no complaint "about the failure of the arresting officers to arraign Cooper Monday night at the court provided for that purpose in Newcastle" (R. 1227), but, with ostrich-like indifference, stood complacently if not approvingly by, absenting himself from the Barracks until after the written confessions of Cooper and Stein had been obtained. He appeared at the arraignment which followed late on the night of June 8th. By a not altogether peculiar coincidence, the arraignment was held on the night of the

very day that a writ of habeas corpus had been sued out on behalf of Stein.

In this instance, as in the case of the resistance which he offered to the complaints of police violence, the District Attorney did nothing to dispel the impression of his complete abdication to the State Police in this case.

Petitioner's Subsequent Oral Statements

Subsequent to the written confession, there were supposedly five oral statements or incriminating acts of petitioner. These statements and acts, we submit, are entitled to no greater consideration than the written confession or the prior oral statement, for they suffered from the same infirmities which rendered the others invalid.

Petitioner, at the time of these subsequent statements and acts, was still in the custody of the State Police; he was still without the aid of counsel whom he had sought from the moment of his arrest; he was still without the solace of relatives or friends, and was still suffering from injuries already inflicted by the State Police.

The principle we here invoke is that stated by this Court in *Malinski* v. *New York*, supra, 428:

> "A man once broken in will does not readily, if ever, recover from the breaking."

Also, at pp. 425-6:

> "No one else except his imprisoners was allowed to see him at any time."

Also, at p. 429:

> ". . . a series of confessions, of which the first is the creative precursor of the later ones."

Even if the later statements or acts were lawfully obtained, the prior confession or statement having once "in-

feeted the trial, the verdict of guilty must be set aside no matter how free of taint the other evidence may be" (*Stroble* v. *California*, 343 U. S. 181, 204; *Malinski* v. *New York*, supra, 433).

Conclusion

The right to due process stands foremost among the rights which the founding fathers carved out of the English Petition of Right. We respectfully urge that to place this Court's seal of approval, even tacitly implied, upon the manner in which these confessions were obtained would not only be a denial of this ancient and traditional right, but would serve to enthrone police brutality throughout the land. Secure in the knowledge that precisely such odious practices as we have outlined have been noted with indifference, if not sanctioned, by the highest Court in the land, police officers could then, and assuredly would, with impunity, make of these evil tactics the standard procedure in obtaining confessions.

The shocking practices resorted to by the police in this case cannot be squared with the decisions of this Court to which we have referred. When illegally delayed arraignment, holding of petitioner incommunicado, intensive interrogation and undisputed proof of brutal beatings all occur in one case, the accumulated enormity of the error is such that, upon the tainted product of such official misconduct, your petitioner cannot, with justice, be sent to his death.

Respectfully submitted,

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APPENDIX

Penal Law of the State of New York, Sec. 1044:

"The killing of a human being, unless it is excusable or justifiable, is murder in the first degree, when committed: . . .

"2. . . . without a design to effect death, by a person engaged in the commission of, or in an attempt to commit a felony, either upon or affecting the person killed or otherwise;"

* * * * * * *

Penal Law of the State of New York, Sec. 1844:

"A public officer or other person having arrested any person upon a criminal charge, who wilfully and wrongfully delays to take such person before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor."

* * * * * * *

Code of Criminal Procedure of the State of New York, Sec. 165:

"The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night. As amended L. 1882, c. 360, Sec. 1; L. 1887, c. 694."

* * * * * * *

Title 28 U. S. Code, Sec. 1257:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . .

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."